NO. 83-409

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COASTAL STEEL CORPORATION,

Petitioner,

vs.

WHEELABRATOR-FRYE INC. and
TILGHMAN WHEELABRATOR LIMITED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether there are "special and important reasons" to review the Court of Appeals' determination that it had jurisdiction over an appeal from the order of the District Court, affirming the order of the Bankruptcy Court and refusing to enforce the forum selection clause in a contract under which Petitioner claims third-party beneficiary status.

2. Whether there are "special and important reasons" to review the Court of Appeals' determination that the contractual forum selection clause should be enforced and the action dismissed.

Parties

All parties to the proceeding in the Court of Appeals, whose judgment is sought to be reviewed, are as set forth in the caption.[1]

Pursuant to Supreme Court Rule 28.1, respondents Wheelabrator-Frye Inc. and Tilghman Wheelabrator Limited set forth the following listing of their corporate relationships:

> Wheelabrator-Frye Inc. was a publicly-owned corporation which on February 1, 1983 was merged into and became a subsidiary of The Signal Companies, Inc. The other subsidiaries of The Signal Companies, Inc., are Ampex Corporation; The Garrett Corporation; Mack Trucks, Inc.; UOP Inc.; Dunham-Bush, Inc.; and Signal Landmark Properties, Inc.
>
> Tilghman Wheelabrator Limited is a corporation organized under the laws of the United Kingdom, and a third-tier subsidiary of Wheelabrator-Frye Inc.

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[1] Petitioner is plaintiff in the original proceeding. In addition to respondents Wheelabrator-Frye Inc. and Tilghman Wheelabrator Limited, the original parties defendant to this action included Sir James Farmer Norton & Co., Ltd., and Charterhouse Japhet Export Finance Co., Ltd., both English companies. By amendment to the complaint, a fifth defendant was later added, Charterhouse Group International, Inc. Farmer Norton went into liquidation and failed to appear in the action, and petitioner subsequently settled its claims against the Charterhouse defendants, leaving only respondents as the remaining defendants.

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Statement of the Case

Petitioner Coastal Steel Corporation ("Coastal Steel"), a New Jersey corporation, seeks review by this Court of a judgment of the Court of Appeals for the Third Circuit

entered in favor of respondents Wheelabrator-Frye Inc. ("Wheelabrator-Frye") and Tilghman Wheelabrator Limited ("Tilghman"). Coastal Steel contends that the Court of Appeals erroneously held that it had appellate jurisdiction to review orders of the Bankruptcy Court and the District Court denying enforcement of a forum selection clause in the contract upon which Coastal Steel's claim against Tilghman and Wheelabrator-Frye was based, and that the Court of Appeals erroneously reversed those orders.

The facts of record are as follows: On November 9, 1976, Coastal Steel entered into a contract with Sir James Farmer Norton & Co., Ltd. ("Farmer-Norton"), a corporation organized under the laws of the United Kingdom, by which Farmer Norton was to supply to Coastal Steel an in-line turn-key steel plant for the commercial production of cold-drawn steel bar. The contract provided that, in the event of a dispute between the parties, the "same shall be settled by arbitration where the property in contest is located . . . ." The plant was to be erected at Coastal Steel's premises in New Jersey.

One component of the plant was a bar cleaning machine or blast unit. The contract did not specify the supplier of the blast unit. While negotiating the contract, however, Coastal Steel had suggested that Farmer Norton consider using a blast unit manufactured by St. George's Engineers, Ltd. ("St. George's"), another English corporation. St. George's submitted a quotation to Farmer Norton in June 1976. Shortly thereafter, St. George's was acquired by Tilghman, itself a manufacturer of blast units.

On November 26, 1976, after the Coastal Steel-Farmer Norton contract had been executed, Tilghman informed Farmer Norton that St. George's had seriously miscalculated the cost of the blast unit in its quotation. Tilghman

and Farmer Norton then contracted for a blast unit of Tilghman's design, at a price higher than the original St. George's quotation but lower than Tilghman's revised cost estimate.[2] The Tilghman-Farmer Norton contract provided that the blast unit would be built in England and delivered to Farmer Norton in England. The contract also provided:

> "15. These conditions shall be construed in accordance with English law. In the event of any dispute arising the same shall be determined by the English Courts of Law."

The blast unit was delivered to Farmer Norton in England as provided in the contract. Farmer Norton then installed the steel plant at Coastal Steel's premises in New Jersey. The Tilghman-Farmer Norton contract required Tilghman to supervise the commissioning of the blast unit after its installation, and Tilghman requested Wheelabrator-Frye, its American parent, which had offices in New Jersey near Coastal Steel's premises, to provide the commissioning services. In late 1979, Tilghman also sent an engineer to New Jersey to make modifications to the blast unit.

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[2] Contrary to Coastal Steel's suggestion that the negotiations between Tilghman and Farmer Norton were "secret" and "unknown" to Coastal Steel, Petition at 3, 8, the record below reveals that Coastal Steel was well aware of the situation and had even rejected an offer by Tilghman to meet with the latter's representatives at the time of the negotiations. Nor is it the case that Coastal Steel's complaint is "premised on a contract between St. Georges and [Farmer] Norton" (Petition at 7): paragraph 12 of the first count of the complaint unambiguously alleges that Farmer Norton "subcontracted" a portion of the contract to *Tilghman* "after" the main contract was executed, and there is no basis in the record for the suggestion that there was a previous contract between St. George's and Farmer Norton.

On April 11, 1980, Coastal Steel closed down its plant and filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. On July 14, 1980, as debtor-in-possession, Coastal Steel commenced the instant action by filing in the United States Bankruptcy Court for the District of New Jersey a complaint against Farmer Norton, Tilghman, Wheelabrator-Frye, and Charterhouse Japhet Export Finance Co., Ltd. ("Charterhouse"), the English firm which had provided Coastal Steel's financing for the purchase. Farmer Norton failed to appear and defend the action. In April 1981, Coastal Steel settled with Charterhouse and dismissed its complaint against it and an affiliate which had been added as a party defendant. Thus Tilghman and Wheelabrator-Frye are the only remaining defendants. From them Coastal Steel seeks over $4 million in consequential damages resulting from alleged defects in the Tilghman blast unit, originally sold by Tilghman to Farmer Norton for $176,000.

Tilghman and Wheelabrator-Frye served answers denying the material allegations of the complaint. After discovery had proceeded for several months and depositions initiated by Coastal Steel had been conducted in England, Tilghman moved to dismiss the action on the basis of the forum selection clause in the Tilghman-Farmer Norton contract and on the alternative ground of *forum non conveniens*. Wheelabrator-Frye joined in the motion in a reply brief. The Bankruptcy Court denied the motion by an order entered on November 9, 1981.

Tilghman and Wheelabrator-Frye applied to the District Court for leave to appeal pursuant to 28 U.S.C. § 1334(b). Coastal Steel moved to dismiss the appeal as to Wheelabrator-Frye. On May 27, 1982, the District Court granted Coastal Steel's motion to dismiss Wheelabrator-Frye as an appellant and affirmed the Bankruptcy Court's order deny-

ing Tilghman's motion to dismiss the action. Tilghman and Wheelabrator-Frye moved the District Court to certify its order for immediate appeal pursuant to 28 U.S.C. § 1292(b). On June 28, 1982, the District Court denied the motion. Tilghman and Wheelabrator-Frye then appealed from the May 27, 1982 order to the United States Court of Appeals for the Third Circuit. Coastal Steel moved to dismiss the appeal for lack of appellate jurisdiction.

By judgment entered May 17, 1983, the Court of Appeals refused to dismiss the appeal and, holding that the forum selection clause should be enforced, reversed the decisions of the District Court and the Bankruptcy Court. Coastal Steel petitioned the Court of Appeals for rehearing and for rehearing in banc. That petition was denied on June 14, 1983. On application by Coastal Steel, the Court of Appeals stayed its mandate for ninety days commencing on June 17, 1983, pending the filing of a petition for certiorari in this Court. Coastal Steel's petition was docketed on September 10, 1983.

Summary of Argument

There are no "special and important reasons" to review the Court of Appeals' determination that it had jurisdiction over respondents' appeal from the order of the District Court, affirming the order of the Bankruptcy Court and refusing to enforce the forum selection clause in the Tilghman-Farmer Norton contract under which Coastal Steel claims third-party beneficiary status. Notwithstanding Coastal Steel's broad assertions to the contrary, there are no decisions of this Court or of other federal circuit courts of appeals which conflict with the decision below. Nor are there any other special and important reasons why this Court should review the particular procedural

route by which the Court of Appeals below reached a manifestly just result on the merits.

Similarly, there are no "special and important reasons" to review the Court of Appeals' determination that the contractual forum selection clause in the Tilghman-Farmer Norton contract should be enforced and the action dismissed in favor of an English forum. Again contrary to Coastal Steel's assertions, there are no decisions of this Court or of other federal circuit courts of appeals which conflict with this aspect of the decision below. Nor are there any other special and important reasons why this Court should review the merits of an appeal which were already reviewed and approved not only by the panel below but by the Court of Appeals in banc.

ARGUMENT

I. There are no "special and important reasons" to review the Court of Appeals' determination that it had jurisdiction to review the order of the District Court.

The majority below concluded that there were three independent bases for appellate jurisdiction to review the order of the District Court. First, it concluded that it had jurisdiction under 28 U.S.C. § 1292(a)(1) pursuant to the "*Enelow-Ettelson* rule" first articulated in *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (1935), and in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942), reasoning that:

> "A motion to dismiss an action in order to give effect to a forum selection clause is in practical effect an application for specific performance of that contractual provision. It is analytically indistinguishable

> from a motion to stay an action at law pending arbitration. Grants or denials of such orders are reviewable under section 1292(a)(1)." 709 F.2d at 194.

The Third Circuit majority then determined that 28 U.S.C. § 1291 provided a second basis for appellate jurisdiction to review the District Court's refusal to enforce the contractual forum selection clause, concluding that this matter fit within the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. In addition, the majority held that it had discretionary mandamus power under 28 U.S.C. § 1651 to review both the forum selection clause and the *forum non conveniens* rulings. *Id.* at 197.[3]

In reaching its conclusion that it had jurisdiction to review the decision of the District Court, the majority in the Court below rejected Coastal Steel's argument that 28 U.S.C. § 1293(b) precludes appellate review of district court decisions reviewing interlocutory orders of the bankruptcy courts under 28 U.S.C. § 1334(b), and in effect repeals by implication appellate review of interlocutory district court orders in bankruptcy cases under 28 U.S.C. §§ 1292 and 1651. See 709 F.2d at 199. While expressing considerable doubt that Congress intended in this fashion "to insulate pendente lite orders of the bankruptcy court from all supervision by the courts of appeals," *id.* at 200, the majority concluded that it did not need to decide this issue in light of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

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[3] In his concurring opinion, Judge Rosenn, while agreeing with the majority on the merits of the appeal, predicated appellate jurisdiction on the rule of *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964). See 709 F.2d at 204-05.

The majority analyzed the effect of the *Northern Pipeline* decision upon the statutory scheme for appellate jurisdiction over related proceedings in the following manner: Reading section 1293(b) as providing an additional grant of jurisdiction to courts of appeals over appeals from district courts sitting as appellate courts pursuant to 28 U.S.C. §§ 1334(a) and (b), it reasoned that, since bankruptcy courts after *Northern Pipeline* could not enter orders or judgments in related cases, orders entered by the district courts could not be considered orders entered in an appellate capacity pursuant to section 1334. Consequently, orders entered in related proceedings by the district court subsequent to the effective date of *Northern Pipeline* must be considered as orders of the district court itself, and governed by sections 1291, 1292, and 1651 rather than by section 1293.

Noting that "[f]rom a purely mechanical viewpoint sections 1334 and 1293 were technically applicable" prior to the effective date of *Northern Pipeline*, 709 F.2d at 199, the majority then concluded:

> "It seems to us the height of artificiality to apply today the nonretroactivity holding of *Northern Pipeline* so as to place under section 1293 orders which tomorrow will fall within sections 1291, 1292 and 1651.
>
> "We hold, therefore, that orders entered in proceedings related to bankruptcy, which were made by the district court pursuant to section 1334, should be deemed orders of the district court and governed by sections 1291, 1292 and 1651." *Id.* at 199-200.

In its petition, Coastal Steel argues that the Third Circuit's determination that it had appellate jurisdiction is "in conflict" not only with "statutory authority," but also "with

decisions of the United States Supreme Court and courts of appeals for other Circuits." Petition at 8.

As the following discussion demonstrates, there are no decisions of other federal courts of appeals in conflict with the decision below. Moreover, and notwithstanding Coastal Steel's assertions as to the sweeping significance of the decision, the Third Circuit has not decided a federal question in a way which conflicts with the applicable decisions of this Court, and there are no other "special and important reasons" why a review on writ of certiorari should be granted. Supreme Court Rule 17.1.

A. The Court of Appeals' ruling that 28 U.S.C. § 1293(b) did not bar this appeal is not in conflict with any other decisions.

Citing only two cases, *Maiorino* v. *Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982), and *International Horizons, Inc.* v. *Committee of Unsecured Creditors (In re International Horizons, Inc.)*, 689 F.2d 996 (11th Cir. 1982), Coastal Steel first asserts that "[s]ection 1293(b) has been uniformly recognized in other circuits as barring interlocutory appeals." Petition at 8. The two cases cited by Coastal Steel are readily distinguishable, however.

In *Maiorino*, the parties in a bankruptcy case sought to appeal by agreement directly to the Second Circuit from an order of the Bankruptcy Court denying confirmation of the Chapter 13 debtor's plan. The Second Circuit, dismissing the appeal, held that section 1293(b) permits direct appeals only from final orders of the bankruptcy courts and that, without such finality, it lacked jurisdiction to review the order of the Bankruptcy Court. In *International Horizons*, also a bankruptcy case and not a related proceeding as is the case at bar, the creditors' committee had sought

the work papers of the debtor's accountant. Both the debtor and the accountant resisted production, citing the client-accountant privilege. The Bankruptcy Court ordered the documents produced, and this was affirmed on appeal to the District Court. On further appeal, the Eleventh Circuit, relying on dictum in *Universal Minerals, Inc.* v. *C.A. Hughes & Co.*, 669 F.2d 98, 101 n.3 (3d Cir. 1981), to the effect that section 1293 provides "a comprehensive and exclusive schema for jurisdiction of bankruptcy appeals," determined that the Bankruptcy Court's order was not final (and therefore not appealable) as to the accountant, but that the order was "final" as to the debtor since the order was directed to a third party. In neither of these bankruptcy cases did the Court of Appeals have occasion to consider whether section 1293(b) preempted 28 U.S.C. §§ 1291, 1292(a)(1), and 1651, as Coastal Steel contends.[4]

Moreover, the issue has been avoided by other courts in bankruptcy cases arising under title 11 by giving the "final-

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[4] *But see Growth Realty Companies* v. *Regency Woods Apartments (In re Regency Woods Apartments Ltd.)*, 686 F.2d 899 (11the Cir. 1982), in which the Eleventh Circuit, in a bankruptcy case arising under title 11, held without extensive examination of the issue that appeal pursuant to 28 U.S.C. § 1292(a) was unavailable from a decision of the district court involving modification of the automatic stay in bankruptcy cases. This is the only federal appellate decision which research has disclosed which goes beyond dictum in supporting Coastal Steel's position. It has been subsequently distinguished, *see First Bank of Billings, Montana* v. *Albuquerque National Bank (In re Glover, Inc.)*, 697 F.2d 907, 909 n.2 (10th Cir. 1983), and does not present a direct conflict with the decision below which is sufficient to warrant review by certiorari. Research has failed to disclose *any* appellate decision which holds or even suggests that section 1293(b) should be read to eliminate the discretionary power of courts of appeals to review district court decisions by writ of mandamus pursuant to 28 U.S.C. § 1651.

ity" requirement of section 1293(b) a less restrictive meaning than section 1291. *See, e.g., Mason* v. *Integrity Insurance Co. (In re Mason)*, 709 F.2d 1313 (9th Cir. 1983); *In re Saco Local Development Corp.*, 711 F.2d 441 (1st Cir. 1983) (direct appeal by agreement from order of Bankruptcy Court); *Moxley* v. *Comer (In re Comer)*, No. 82-3469 (3d Cir. August 26, 1983) (available on LEXIS, Genfed library, Cir file) (appeal from district court order lifting automatic stay against lien enforcement action). Under this line of authority, the order of the District Court in the instant case could be considered "final" within the ambit of section 1293(b) as well.

There is likewise no indication in the legislative history of the Bankruptcy Reform Act that section 1293(b) was intended to be "the sole repository of bankruptcy appellate jurisdiction," as Coastal Steel contends, Petition at 9, thereby negating by implication 28 U.S.C. §§ 1291, 1292, and 1651. Subsection (b) of section 1293 was originally intended to permit the parties to an appeal to bypass the new appellate panels in favor of appealing directly to the court of appeals. The language of section 1293(b) describing appeals from the district court was added to the bill on the eve of its enactment, without explanation, and, according to one authority at least, "simply could not have been thought through." *See* 16 C.A. Wright, A Miller & E. Cooper, *Federal Practice and Procedure* § 3926 at 40 (Supp. 1982).

Although the better view of section 1293(b) is that it was intended to confirm and supplement the existing jurisdiction of courts of appeals, it is to be recognized that "jurisdiction of the district courts has been left in a sorry state of uncertainty" by the Bankruptcy Reform Act. *Id.* at 39. But that state of uncertainty was created not by the decision below but in 1978 with the passage of the Act, and

is in the process of being resolved by Congress.[5] There is no special or important reason why this Court should address that issue in the context of the decision below.

Coastal Steel's contention that the Third Circuit's application of *Northern Pipeline, supra,* "effectively invalidates all Bankruptcy Court Orders rendered both before and after" *Northern Pipeline,* Petition at 9, is similarly without merit. The decision below did not "invalidate" any decision by the Bankruptcy Court or District Court; instead, it held only that the District Court's decision affirming the Bankruptcy Court and refusing to dismiss the instant related proceeding should be considered an order of the District Court reviewable under sections 1291, 1292, and 1651.

Moreover, the concern of this Court in limiting its holding in *Northern Pipeline* to prospective application was to avoid "substantial injustice and hardship" for "those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." 458 U.S. at ——, 102 S. Ct. at ——, 73 L. Ed. 2d at 626. This language suggests that the "prospective only" nature of the Court's ruling in *Northern Pipeline* was intended only to validate *final* orders and dispositions of the bankruptcy courts prior to the effective date of the decision. *See also White Motor Corp.* v. *Citibank, N.A.,* 704 F.2d 254, 259 (6th Cir. 1983).

As the Third Circuit correctly noted in applying *Northern Pipeline* retroactively in the instant case,

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[5] In this connection, it should be noted that the Senate Committee on the Judiciary, in S. Rep. No. 97-150, pointed out that the proposed amendment to section 1293 contained in section 218(b)(3) of S. 863, the Bankruptcy Amendments Act of 1981, which provides for appeals from interlocutory orders of district courts, was a correction of a technical error, and not a substantive change. S. Rep. No. 97-150, 97th Cong., 1st Sess. 21 (1981).

> "There is no hardship . . . in this instance, because the case has not yet been tried, and when it is, it must be tried in the district court, not the bankruptcy court." 709 F.2d at 199.

The Third Circuit majority opinion must be read in its limited contex of an appeal from a district court order reviewing a bankruptcy court decision in a related proceeding which bankruptcy courts no longer are permitted to determine. This case is *in fieri*. No important rights of other parties are affected by this limited ruling.[6]

B. There are no "special and important reasons" to review the Court of Appeals' determination that it had jurisdiction under 28 U.S.C. §§ 1291, 1292 and 1651.

Coastal Steel contends further that the Third Circuit erred in finding appellate jurisdiction under sections 1291, 1292(a), and 1651, and takes Judge Rosenn to task for applying *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148 (1964), as the jurisdictional predicate for appellate review in his concurring opinion. Thus, Coastal Steel argues that the majority "erroneously extended" the *Enelow-Ettelson* rule to find jurisdiction under section 1291, "misapplied" the collateral order doctrine, and "improperly exercised" review by mandamus. It asserts further that the concurring opinion "improperly broadened and expanded" the rule in *Gillespie*. See Petition at 9-12.

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[6] Moreover, the ruling was not necessary to the outcome, since the majority presumably would have determined that the District Court's order was "final" for purposes of section 1293(b) as well as section 1291, and since, as the concurring opinion demonstrated, *Gillespie* was available as an alternative basis for jurisdiction.

These arguments amount to little more than an effort to reargue Coastal Steel's motion to dismiss the appeal. No conflicting decisions by other federal courts of appeals are cited, and only by a tenuous logic is the proposition suggested that the Court below decided a federal question in conflict with applicable decisions of this Court. It is submitted that the Third Circuit's decision to reach the merits of the appeal was amply supported by authority, and that its decision does not present any "special and important reasons" why this Court should grant a writ of certiorari for further review.

1. The Enelow-Ettelson rule.

The majority found that Tilghman and Wheelabrator-Frye's appeal fell "within the classic . . . formulation" of the scope of section 1292(a)(1) articulated by this Court in *Enelow* v. *New York Life Insurance Co., supra,* and *Ettelson* v. *Metropolitan Life Insurance Co., supra.* In a decision rendered the same day as *Enelow,* this Court specifically held orders granting or denying motions to stay an action at law pending arbitration to be appealable under the *Enelow* rationale. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U.S. 449 (1935).

Coastal Steel cites no decision either of this Court, of any other federal court of appeals, or of any state court of last resort, with which this holding of the Court below conflicts. In *Morgantown* v. *Royal Insurance Co.,* 337 U.S. 254 (1949), cited by Coastal Steel, this Court merely declined to apply the *Enelow-Ettelson* rule in the context of an appeal of an order striking a jury demand. The Court observed that the order was simply "a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself,"

id. at 257, and that the principles underlying the *Enelow-Ettelson* rule did not support an analogy between such an order and an appealable injunction, *id.* at 258. Justice Frankfurter's concurring opinion made it clear that *Morgantown* left the *Enelow-Ettelson* rule "unimpaired." *See id.* at 259.

2. *The collateral order doctrine.*

The majority in the Court below conducted an exhaustive analysis of the nature and effect of the District Court's order in finding that it met the three-part test for collaterally final orders appealable under 28 U.S.C. § 1291, articulated by this Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978), and recently reaffirmed in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation*, —— U.S. ——, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

Coastal Steel first challenges the Court of Appeals' finding that the District Court's order met the second part of the *Coopers & Lybrand* test, *i.e.*, that the order must "resolve an important issue completely separate from the merits of the action." *See* 437 U.S. at 468. The Court of Appeals had little difficulty in finding that the District Court's order met this test, despite its recognition that in determining whether to enforce a forum selection clause, the forum court may look to factors bearing on the merits of the underlying action. The Court found it dispositive that the *legal right* established by a contractual forum selection clause "is analytically distinct from the rights being asserted in the dispute to which it is addressed." 709 F.2d at 195.

Coastal Steel argues further that

> "[t]he decision of the Court of Appeals . . . extends the collateral order doctrine beyond its established guidelines and into a new basis for appellate jurisdiction *under which all orders relating to a change of venue would be appealable as of right.*" Petition at 10 (emphasis added).

However, this statement misconstrues the opinion of the Court of Appeals. The Court's holding is clearly limited to orders denying enforcement of forum selection clauses. It does not encompass "all orders relating to a change of venue." Coastal Steel cites no decision of this Court or of any other court of appeals with which the opinion of the Court below conflicts, nor does Coastal Steel present any genuine reason why this Court should exercise its discretion to review this aspect of the Court of Appeals' decision.

Coastal Steel also challenges the holding of the Court below that the District Court's order met the third requirement for collateral finality under *Coopers & Lybrand*, namely that it "be effectively unreviewable on appeal from a final judgment." *See* 437 U.S. at 468. The Court of Appeals found that review of the order after trial on the merits might be barred by 28 U.S.C. § 2105, which prohibits reversal by a court of appeals "for error in ruling upon matters in abatement which do not involve jurisdiction." Coastal Steel has made no showing that the Court of Appeals' construction or application of section 2105 conflicts with any decision of this Court or of any other court of appeals. Indeed, the Court of Appeals' analysis of the statute is well-reasoned and compelling.

Moreover, the Court's holding with respect to section 2105 is in fact unnecessary to its ultimate holding that the District Court's order met the third requirement of *Coopers & Lybrand*. As respondents argued in their briefs below, a delay until after trial in reviewing an erroneous decision regarding the enforceability of this forum selection clause would effectively deprive Tilghman and Wheelabrator-Frye not only of their right to have the dispute heard in the Courts of England, but also of their concomitant right to recover their costs of the action (including attorneys' fees) should they be successful in that forum. Unless it was reviewed at this stage of the proceedings, the District Court's order would have been effectively unreviewable.

3. Review by mandamus.

Observing that mandamus would appropriately issue if the trial court's error was "egregious" and "the likely harm from delayed review [would be] serious," see 709 F.2d at 197, the majority in the Court below held it had discretionary power under 28 U.S.C. § 1651 to review both the *forum non conveniens* and forum selection clause rulings of the District Court. The concurring opinion agreed that "[t]he general guiding principle is that mandamus is appropriate in cases involving serious abuse of discretion by the district court." *Id.* at 209. Since the Court's exercise of its mandamus power is discretionary and clearly "in aid of" the Court's appellate jurisdiction and in conformity with the statute, it cannot be construed to present a special or important reason for this Court to exercise its discretion and grant the writ of certiorari.

4. The rule in Gillespie.

Although disagreeing with the majority's opinion that 28 U.S.C. §§ 1292(a)(1), 1291, and 1651 were proper bases for the appellate jurisdiction of the Court of Appeals below, the concurring opinion would have held that the Court had jurisdiction under the rule announced by this Court in *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148 (1964), and like the majority, would not have dismissed the appeal.

Coastal Steel fundamentally misstates the scope of the concurring opinion in arguing that "[t]he decision of the Court of Appeals has raised *Gillespie* from an extraordinary remedy to a new basis for appeal which is readily applicable to every interlocutory appeal . . . ." Petition at 12. The opinion was carefully limited to the instant case. Judge Rosenn noted that the *Gillespie* rule "gives appellate courts much discretion in deciding whether to review district court orders," 709 F.2d at 213, and carefully tailored his opinion to the facts of this case. It is consistent with this Court's intent in *Gillespie* itself and with the application of *Gillespie* by other circuits, *see, e.g., Ingalls Shipbuilding Division* v. *White*, 681 F.2d 275 (5th Cir. 1982); *Wescott* v. *Impresas Armadoras, S.A. Panama*, 564 F.2d 875 (9th Cir. 1977).

II. There are no "special and important reasons" to review the Court of Appeals' determination that the contractual forum selection clause should be enforced and the action dismissed.

In holding that the decisions of the District Court and the Bankruptcy Court refusing to enforce the forum selection clause must be reversed, the Court of Appeals applied the rule articulated by this Court in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The Court stated that it need not resolve the question whether federal or state law determines enforceability, as *"The Bremen* announces a general rule which would be applied in each of the arguably interested jurisdictions." 709 F.2d at 202. That general rule, said the Court, is that

> "a forum selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes (1) that it is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would in the particular circumstances of the case result in litigation so seriously inconvenient as to be unreasonable." *Id.*

Since the first factor had not been at issue in either the Bankruptcy Court or the District Court below, the Court of Appeals limited its discussion to the second and third factors. Its decision that the forum selection clause should be enforced is consistent with the decisions of this Court and of other circuits, and there is no "special and important reason" why review by certiorari should be granted.

A. The jurisdictional provisions of the Bankruptcy Reform Act, as codified in 28 U.S.C. § 1471, set forth no public policy that precludes the enforcement of the forum selection clause in the Tilghman-Farmer Norton contract.

With respect to the public policy issue, the Court of Appeals disagreed with the Bankruptcy Court's finding (ignored by the District Court) that the broad jurisdictional grant embodied in the Bankruptcy Reform Act represented a policy disfavoring forum selection clauses. The Court found nothing in the language of the Act itself or in its legislative history to suggest that Congress intended to change the public policy favoring such clauses which is manifested in the common law as expressed in *Bremen* and similar state and federal cases. The Court found that "[a]t best" the Bankruptcy Court's expanded jurisdiction over proceedings related to title 11 "is one circumstance to be taken into account in making the unreasonableness determination." 709 F.2d at 202.[7]

Coastal Steel argues that because "the purpose" of the Bankruptcy Reform Act was to vest the Bankruptcy Court with comprehensive jurisdiction, the Court of Appeals below was erroneous in holding that the Act did not embody a strong public policy which would preclude enforcement of the forum selection clause under the *Bremen* rule. Coastal Steel contends that the Act expresses a policy "no less significant" than the policy found to underlie the Federal Employers' Liability Act in *Boyd* v. *Grand Trunk W.R. Co.*, 338 U.S. 263 (1949), which was

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[7] *Cf.* Coastal Steel's description of the decision of the Third Circuit as holding that "a contractual forum selection clause is absolutely enforceable in a Bankruptcy Court . . . ." Petition at 5.

cited by this Court in *Bremen* as an example of a public policy that would preclude enforcement of a forum selection clause.

The Court of Appeals below, however, was faithful to *Bremen* in implicitly distinguishing this case from *Boyd*. In *Boyd*, the parties had executed a forum selection contract sharply curtailing the wide choice of venue given to plaintiffs under the FELA. This Court held that the contract was void as a contract to "exempt [the defendant] from liability" under the Act, in contravention of a specific provision of the Act prohibiting such contracts. *See id.* at 265. By contrast, 28 U.S.C. § 1471(b) merely gives the bankrupcty courts nonexclusive jurisdiction over disputes like the one at bar.[8] A forum selection clause like the one in the Tilghman-Farmer Norton contract does not "oust" the bankruptcy court of that jurisdiction, *see Bremen*, 407 U.S. at 12; it merely presents the court with a presumptively valid agreement of the parties to have their dispute heard in another forum of concurrent jurisdiction.

Nor does the decision of the Court below conflict with its decision in *Zimmerman* v. *Continental Airlines, Inc.*, 712 F.2d 55 (3d Cir. 1983), also cited by Coastal Steel. In *Zimmerman* the Court held that section 3 of the Arbitration Act, 9 U.S.C. § 3, which provides for a mandatory stay of proceedings in federal courts pending arbitration, was impliedly modified by the broad jurisdictional provisions of the Bankruptcy Reform Act. The Court held that as a result, the power to stay proceedings pending

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[8] Moreover, whatever public policy may be reflected in the broad grant of jurisdiction in 28 U.S.C. § 1471(b) may well have been vitiated by this Court's decision in *Northern Pipeline, supra*.

arbitration should be entrusted to the sound discretion of the bankruptcy court. *Id.* at 59-60. The *Zimmerman* Court clearly did not hold that the jurisdictional policies of the Bankruptcy Reform Act precluded arbitration.[9]

B. The Court of Appeals was correct in holding that enforcement of the forum selection clause in the Tilghman-Farmer Norton contract would not be unreasonable under the circumstances of the case.

The Court of Appeals also reviewed each of the factors on which the Bankruptcy Court and the District Court had relied in determining that the forum selection clause should not be enforced because enforcement would be unreasonable under the circumstances. The Court of Appeals unanimously found that "none of the reasons relied on by either the Bankruptcy Court or the District Court for denying the motion for enforcement of the forum selection clause is legally sufficient." 709 F.2d at 204; see *id.* at 213.

Coastal Steel states that the Court of Appeals "improperly rejected *Bremen*" in reviewing the factors considered by the Courts below, and relied instead "upon a discretionary subjective and *sui generis* review process . . . , substituting its own judgment for that of the Bankruptcy Court and District Court." Petition at 8. To the contrary, and as noted above, the Court of Appeals held that the Bankruptcy Court and District Court had failed to follow *Bremen*, and applied *Bremen* in holding that the forum selection clause should be enforced.

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[9] Interestingly, the *Zimmerman* Court cited the opinion of the Court of Appeals in this case as controlling on the issue of appellate jurisdiction. *Id.* at 56-57 n.1. The Court made no mention of the decision in discussing the jurisdictional policies of the Bankruptcy Reform Act, implying that the question of inconsistency between this case and *Zimmerman* had not even been raised.

CONCLUSION

The issues presented by the Petition have been reviewed not only by the panel in the Court of Appeals below, but by the entire Court *in banc*. Both the majority and the concurring opinions reflect the view of the Court that, on the merits of the appeal, Coastal Steel's claims "should be tried in the English courts in accordance with the forum selection clause in the Tilghman-Farmer Norton contract under which Coastal Steel claims third-party beneficiary status." 709 F.2d at 204. While the majority and concurring opinions disagree over the procedural route by which the Court should have reached the merits, the result does not conflict with the decisions of this Court or of any other circuits, and does not present any substantial federal questions which are necessary or appropriate for this Court to review at this time.

For the foregoing reasons, it is respectfully submitted that, since there are no "special and important reasons" for reviewing the decision of the Third Circuit Court of Appeals, this Court should exercise its discretion and deny Coastal Steel's petition for a writ of certiorari to the Third Circuit.

Respectfully submitted,

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